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August 3, 2010

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Office of Proceedings

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Public Record

### VIA E-FILING

Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington DC 20423-0001

Re: STB Docket No. AB-1043 (Sub-No. 1)  
Montreal, Maine & Atlantic Railway, Ltd. - Discontinuance Of Service And  
Abandonment - In Aroostook And Penobscot Counties, ME

Dear Ms. Brown:

In accordance with the decisions July 20<sup>th</sup> and 23<sup>rd</sup> in the above referenced proceeding, enclosed is an original of the "Comments Of Kansas City Southern" to be filed in the above referenced proceeding. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Sincerely,

*William A. Mullins*  
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William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. AB-1043 (SUB-NO. 1)**

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**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.  
- DISCONTINUANCE OF SERVICE AND ABANDONMENT -  
IN AROOSTOOK AND PENOBSCOT COUNTIES, ME**

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**COMMENTS OF KANSAS CITY SOUTHERN**

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**Attorneys for Kansas City Southern**

**Dated: August 3, 2010**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. AB-1043 (SUB-NO. 1)**

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**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD.  
– DISCONTINUANCE OF SERVICE AND ABANDONMENT –  
IN AROOSTOOK AND PENOBSCOT COUNTIES, ME**

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Pursuant to decisions served in this proceeding on July 20<sup>th</sup> and 23<sup>rd</sup>, Kansas City Southern (“KCS”) files these comments as an interested party<sup>1</sup> with respect to whether the Board has “authority to order access over a carrier’s lines into a foreign country.” KCS submits that the Board lacks such authority.<sup>2</sup>

**Commentor’s Interest.** KCS is a non-carrier holding company that controls, either directly or indirectly, three rail carriers subject to the Surface Transportation Board’s (“STB” or

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<sup>1</sup> The decisions speak of allowing “interested parties” to file comments by August 3. Although KCS has not previously been a “party” to this proceeding, as a company that controls a Mexican railroad, KCS is an “interested party” with respect to whether the Board has authority to order access beyond the borders of the United States. Therefore, out of an abundance of caution, KCS specifically requests to be made a party of record to this proceeding. See, e.g., Escanaba & Lake Superior Railroad Company – Abandonment Exemption – In Ontonagon and Houghton Counties, Mich., STB Docket AB-415 (Sub-No. 2X) (in which the Board permitted interested persons not already parties to the proceeding to late file substantive comments in response to the proposed rail line abandonment). Further, KCS requests that the Board treat these comments as also constituting a petition for leave to intervene under 49 C.F.R. § 1112.4. Consistent with that regulation, because KCS’s participation in this proceeding will not disrupt the schedule set by the July 23<sup>rd</sup> order nor unduly broaden the issues raised in the proceeding, KCS should be allowed to intervene in this matter.

<sup>2</sup> The Kansas City Southern Railway Company (“KCSR”), a Class I U.S. rail carrier subsidiary of KCS, is a party to the comments being filed herein by the Association of American Railroads (“AAR”). KCSR fully supports AAR’s comments, which focus on whether 49 U.S.C. §§10903 and 10904 “support the imposition of conditions...requiring access of any sort.” Accordingly, KCS’s comments address the other issue raised by the Board – whether the agency has authority to order access over rail lines in a foreign country.

“Board”) jurisdiction: KCSR, The Texas Mexican Railway Company, and Gateway Eastern Railway Company.

KCS also controls Kansas City Southern de Mexico, S.A. de C.V. (“KCSM”). KCSM is headquartered in Mexico City and, pursuant to a concession granted by the Estados Unidos Mexicanos, operates a rail system of 2,645 track miles, serving northeastern and central Mexico and the port cities of Lazaro Cardenas and Tampico. KCSM does not own, control, or operate any rail lines in the United States.

**Factual Background of This Proceeding.** The Montreal, Maine & Atlantic Railway, Ltd. (“MMA”) filed an application under 49 U.S.C. §10903 to abandon 233 miles of its line in Penobscot and Aroostook Counties, Maine. July 20<sup>th</sup> decision at 1. Aroostook County borders the Canadian provinces of Quebec and New Brunswick.

By application filed July 19, the State of Maine (“State”), acting through its Department of Transportation, filed an Offer of Financial Assistance (“OFA”) application under 49 U.S.C. §10904 to acquire the line MMA proposed to abandon. The Board accepted the State’s OFA application by decision served July 23 (the “July 23 OFA decision”), and tolled the schedule for processing the OFA pending the Board’s decision on the two issues presented for comment by the Board’s July 20<sup>th</sup> decision. In accepting the State’s OFA application, the Board noted that the State’s application is “conditioned on... granting the State’s new operator overhead trackage rights over the northern and southern ends of MMA’s remaining system to reach other carriers.” July 23 OFA decision, at 2. And, as noted in the Board’s July 20<sup>th</sup> decision, “the terminus of the MMA line to the north over which the State seeks access is located in Canada.” July 20<sup>th</sup> decision, at 3.

**Issue Presented.** The Board's July 20<sup>th</sup> decision requests that interested parties file comments on whether the Board has "authority to order access over a carrier's lines into a foreign country."

**The Board Lacks Authority to Order Access Over Rail Lines in a Foreign Country.**

The Board lacks authority to impose conditions on a transaction which would exert control over rail operations in a foreign country. 49 U.S.C. §10501(a)(2) clearly states that the Board's authority "applies only to transportation in the United States." This is consistent with "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Smith v. U.S.*, 507 U.S. 197, 204 (1993)(citing authorities). Congress not only did *not* demonstrate an intent for the Board to have jurisdiction beyond U.S. borders – in fact, the intent that the Board's authority be *confined* to U.S. soil is clearly expressed in Section 10501(a)(2).

While this principle applies even more clearly at the U.S.-Mexico border, where the rail carriers operate on one side of the border or the other, but not on both sides of the border,<sup>3</sup> the same principle applies with equal force at the U.S.-Canada border where carriers' operations cross the border. Thus, for example, in *Borealis Infrastructure Trust Management Inc., Sole Trustee of the Borealis Transportation Infrastructure Trust – Acquisition Exemption – Detroit River Tunnel Company*, STB Finance Docket No. 33984 (and related cases) (consolidated decision served Dec. 19, 2001) ("*Borealis*"), the Board confined its exemption grants to "the

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<sup>3</sup> For additional briefing on limitations of the Board's authority with respect to the U.S.-Mexico border, *see* the following KCS pleadings submitted in Kansas City Southern -- Control -- The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, STB Finance Docket No. 34342: KCS-3/TM-3 (filed May 14, 2003) at 22, n. 15; KCS-19/TM-18 (filed Sept. 22, 2003) at 19-23; and KCS-22/TM-19 (filed Oct. 15, 2004) at 32-36.

United States interests” of the cross-border transactions, specifying down to the hundredth of a mile and the thousandth of an acre how much U.S. property was involved.<sup>4</sup>

Recent authorities such as *Borealis* are consistent with a long line of Interstate Commerce Commission (“ICC”) precedent which has confined assertion of the agency’s authority to within the borders of the U.S. The ICC many times stated that it lacked authority to regulate operations, rates, or interchange practices of a carrier’s foreign operations. *E.g., National Insulation Transportation Committee v. Aberdeen and Rockfish Railroad Company*, 365 I.C.C. 624, 626 (1982)(“[T]he Administrative Law Judge properly decided that the Commission has no jurisdiction over the transportation service performed by the Canadian railroad entirely in Canada.”); *Changes in Routing Provisions – Conrail – Western Railway Co. – Petition to Impose Surcharge for Conrail*, 365 I.C.C. 753, 766 (1982)(Commission lacked jurisdiction to address anticompetitive conduct by a foreign carrier in a foreign jurisdiction).

Not only is Board and ICC precedent that confines the exercise of agency authority to the borders of the U.S. required by Section 10501(a)(2), it also is eminently sensible to avoid interfering with the regulatory framework governing lines and operations in the foreign country. For example, in Mexico, each concessionaire’s concession title describes where its competitors are allowed to operate on its lines under trackage rights. These rights were established as part of the concession each concessionaire (such as KCSM) purchased from the government. “Beyond rights granted in the concession title or by mutual agreement, however, SCT appears to have no

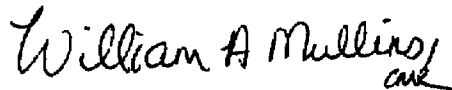
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<sup>4</sup> Even if a foreign carrier operates rail property in the United States, the Board’s jurisdiction is limited to regulating or imposing conditions only upon the rail line, employees, and property located in the United States. *See e.g., Canadian National Railway Company and Canadian Pacific Limited – Application for Trackage Rights Over Consolidated Rail Corporation Trackage in Detroit, MI*, Finance Docket No. 30387 (Sub-No.1), 1984 ICC LEXIS 332 at \*21, (ICC served Aug. 24, 1984)(Refusing to require CN and CP to enter into certain agreements with carriers in the United States because “the interchange practices of Canadian carriers in Canada [were] beyond [its] jurisdiction.”).

general authority to grant (or impose) additional trackage or haulage rights to (or on) concessionaires during the terms of the concession.”<sup>5</sup> Thus, were the Board to assert that it could grant access over lines in Mexico, the Board would be putting itself in the anomalous position of asserting authority in Mexico that even the Mexican government does not have. Granting access over lines in Canada would be equally invasive of Canadian sovereignty and the Canadian regulatory scheme.

**Conclusion.** If the Board were to attempt to use its authority to approve a transaction that is clearly within its jurisdiction (the abandonment of a line of railroad located in the U.S.) in order to impose a condition that could only be implemented in a foreign country (forced trackage rights on a line located in Canada, or Mexico for that matter), such an action would be beyond this Board’s jurisdiction, and would raise substantial judicial and foreign comity concerns. KCS respectfully requests that this Board refrain from taking any such extraterritorial action.

Respectfully submitted,

  
William A. Mullins

August 3, 2010

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<sup>5</sup> Article by former ICC General Counsel Richard A. Allen, published at <http://www.zsrlaw.com/publications/articles/raa0901.htm>.

### **CERTIFICATE OF SERVICE**

I have this day served a copy of the foregoing Comments Of Kansas City Southern upon all other parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: August 3, 2010

  
William A. Mullins

Attorney for Kansas City Southern